

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DONALD L. MOSHIER, JR)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 05-180(ERIE)
)	
UNITED STATES OF AMERICA,)	JUDGE MCLAUGHLIN
JOHN J. LAMANNA (Former Warden),)	MAGISTRATE JUDGE BAXTER
DOCTOR BEAM (Doctor at FCI McKean),)	
DOCTOR OLSON (Doctor at FCI McKean),)	Electronically Filed
DOCTOR SMITH (Health Administrator),)	
and JAMES SHERMAN)	
(FCI McKean Warden),)	
)	
Defendants.)	

**DEFENDANTS' PARTIAL MOTION TO DISMISS
OR, IN THE ALTERNATIVE, PARTIAL MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(6) and 56(c) of the Federal Rules of Civil Procedure, defendants the United States of America, John J. LaManna, Herbert Beam, M.D., Dennis Olson, M.D., Rodney Smith, H.S.A. (incorrectly identified as "Doctor Smith") and James Sherman, by their undersigned counsel, file the following Partial Motion to Dismiss or, in the Alternative, Partial Motion For Summary Judgment, and in support thereof state as follows:

1. Plaintiff Donald L. Moshier, Jr. filed this *pro se* lawsuit alleging that, while incarcerated at a federal prison in McKean County, Pennsylvania ("FCI McKean"), he received inadequate medical care from defendants in connection with his Hepatitis C, gallbladder problems and a growth on the side of his stomach.

2. Specifically, plaintiff's Amended Complaint asserts a claim pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that defendants violated his Eighth Amendment right to be free from cruel and unusual

punishment, and a negligence claim under the Federal Tort Claims Act, 28 U.S.C. § 2670 *et seq.* (“FTCA”).

3. As relief, plaintiff seeks \$200,000.00 in damages, plus any other relief the Court deems appropriate.

4. Plaintiff has named as defendants the United States of America and five (5) individuals (the “Individual Defendants”) as follows: (i) John J. LaManna, former Warden, FCI McKean; (ii) Herbert Beam, M.D., Staff Physician, FCI McKean; (iii) Dennis Olson, M.D., Clinical Director, FCI McKean; (iv) Rodney Smith, Health Services Administrator, FCI McKean; and (v) James Sherman, former Warden, FCI McKean.

5. The Court, however, should dismiss plaintiff’s *Bivens* claims in their entirety for the following reasons: (i) plaintiff failed to exhaust his administrative remedies as to his claims alleging deliberate indifference as to his gallbladder problems and a growth on the side of his stomach; (ii) plaintiff cannot prove the “deliberate indifference” necessary to assert a claim under the Eighth Amendment against any of the Individual Defendants; (iii) even if plaintiff could show a constitutional violation, the Individual Defendants are entitled to qualified immunity; and (iv) all of the Individual Defendants except for defendant Sherman should be dismissed based on inadequate service of process.

6. The Court should also dismiss plaintiff’s FTCA claim as to the Individual Defendants, because they are not proper parties to such a claim. Moreover, the FTCA claim should be dismissed to the extent that it alleges that plaintiff received negligent medical treatment for his gallbladder problems and a growth on the side of his stomach, because plaintiff failed to exhaust his administrative remedies on these claims.

7. Accordingly, the Court should grant defendants' partial motion to dismiss or partial motion for summary judgment. Plaintiff's only remaining claim in this lawsuit should be his FTCA claim against the United States alleging negligent medical treatment for Hepatitis C.

8. Defendants' Brief in support of this Motion, together with accompanying Exhibits 1a through e, 2 and 2a, and 3 are incorporated in this Motion by reference.

WHEREFORE, defendants respectfully request that the Court issue an Order granting their partial motion and dismissing or entering summary judgment as to plaintiff's *Bivens* claims in their entirety (Count II), and plaintiff's FTCA claims (Count I) against the Individual Defendants, and to the extent that they allege negligent medical treatment for plaintiff's gallbladder problems and a growth on the side of his stomach.

A proposed order is attached

Respectfully submitted,

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Dated: September 21, 2006